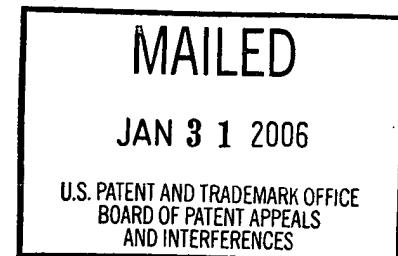


The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte JAMES A. SMITH,
BERNARD SCHOTT and
LEONARDUS AAN DE MEULEN



Appeal No. 2006-0011
Application No. 09/926,109

HEARD: DECEMBER 15, 2005

Before GARRIS, WALTZ, and JEFFREY T. SMITH, Administrative Patent Judges.

GARRIS, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on an appeal which involves claims 1-8 and 11-29.

The subject matter on appeal relates to an aqueous adhesive comprising as binder an aqueous dispersion of a mixture made from a polymer A), at least 60% by weight of which is composed of ethylene, and from a polymer B), at least 60% by weight of which is composed of vinylaromatics, dienes or mixtures thereof. The appealed subject matter also relates to a textile

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floorcovering having more than one layer bonded by an adhesive of the type described above.

This appealed subject matter is adequately illustrated by independent claims 1, 13 and 21, which read as follows:

1. A textile floorcovering having more than one layer, wherein the layers have been bonded by an adhesive which comprises, as binder, an aqueous dispersion of a mixture made from a polymer A), at least 60% by weight of which is composed of ethylene and from a polymer B), at least 60% by weight of which is composed of vinylaromatics, dienes or mixtures of these, wherein the textile floorcovering is a tufted carpet, and wherein one layer is a tufted backing fabric, and one layer is a secondary backing bonded to said tufted backing fabric by said adhesive.

13. An aqueous adhesive comprising, as binder, an aqueous dispersion of a mixture made from a polymer A), at least 60% by weight of which is composed of ethylene and from a polymer B), at least 60% by weight of which is composed of vinylaromatics, dienes or mixtures of these, and comprising a thickener, where the thickener is a copolymer of ethylenically unsaturated compounds at least 50% by weight of which are ethylenically unsaturated acids, ethylenically unsaturated amides or mixtures of these.

21. A textile floorcovering having more than one layer, wherein the layers have been bonded by an adhesive which comprises, as binder, an aqueous dispersion of a mixture made from a polymer A), at least 60% by weight of which is composed of ethylene and from a polymer B), at least 60% by weight of which is composed of vinylaromatics, dienes or mixtures of these, wherein the proportions by weight of the polymer A) is less than 10% by weight, based on the total of A) and B).

The references set forth below are relied upon by the examiner in the § 102 and § 103 rejections before us:

Perlinski	5,403,884	Apr. 4, 1995
Smesny et al. (Smesny)	5,851,625	Dec. 22, 1998
Lattime et al. (Lattime)	6,162,848	Dec. 19, 2000
Sumitomo et al. (JP '972) ¹	58-41972	Mar. 11, 1983
Sumitomo et al. (JP '037) ¹	58-152037	Sept. 9, 1983

¹ Our understanding of these references is based on the English translations of record.

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Under 35 U.S.C. § 102(b): claims 1-3, 7, 8, 11, 12, 14 and 15 are rejected as being anticipated by JP '037; and claims 1-3, 7, 8, 11, 12, 14, 15, 18 and 19 are rejected as being anticipated by JP '972.

Under 35 U.S.C. § 103(a): claims 16, 17 and 22-26 are rejected as being unpatentable over JP '037 or JP '972; claim 4 is correspondingly rejected as being unpatentable over either of the JP references in view of Lattime; claims 5, 6, 13 and 27-29 are rejected as being unpatentable over JP '037 or JP '972 in view of Smesny; claims 20 and 21 are rejected as being unpatentable over JP '972; claims 13 and 27-29 are rejected as being unpatentable over Perlinski in view of Smesny; and claim 21 is rejected as being unpatentable over Perlinski alone.

We refer to the brief and reply brief and to the answer for a complete exposition of the opposing viewpoints expressed by the appellants and by the examiner concerning the above-noted rejections.

OPINION

For the reasons expressed below, we cannot sustain the examiner's § 103 rejections of claim 25 over JP '037 or of claim 26 over either JP '037 or JP '972 or of claim 29 over either JP '037 or JP '972 in view of Smesny or of claim 29 over Perlinski in view of Smesny. However, we will sustain each of the other rejections advanced by the examiner because, as fully detailed in the answer and amplified below, the examiner has established a *prima facie* case of unpatentability with respect to each of these other rejections which the appellants have not successfully rebutted with argument or evidence on the record of this appeal.²

² As a matter of clarification, in both the brief and reply brief, the appellants have discussed certain specification data which involve a comparison of their adhesive with an adhesive unrelated to the adhesives of the applied Japanese and Perlinski references. Due to this last mentioned circumstance, the afore-noted data has no apparent relevance to the patentability issues raised by the rejections before us. More importantly, in accordance with

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For the reasons fully detailed in the answer, we agree with the examiner's anticipation findings concerning the Japanese references and with the examiner's rebuttals to the appellants' argument against these findings. In particular, these references disclose a textile floorcovering embodiment which includes a secondary backing of the type here claimed (e.g., see the findings and rebuttals on pages 10-13 of the answer). We hereby sustain, therefore, the § 102 rejection of claims 1-3, 7, 8, 11, 12, 14 and 15 as being anticipated by JP '037 as well as the § 102 rejection of claims 1-3, 7, 8, 11, 12, 14, 15, 18 and 19 as being anticipated by JP '972.

With respect to the § 103 rejections over JP '037 or JP '972, the appellants' arguments regarding claims 22 and 23 are unpersuasive as correctly explained by the examiner in the paragraph bridging pages 15 and 16 of the answer. Contrary to the appellants' apparent belief, each of the Japanese references expressly teaches the inclusion of up to 10 wt.% acrylic acid (see translation page 8 of JP '037 and translation page 7 of JP '972) and therefore satisfies the ethylenically unsaturated acid limitations of these claims. Like the examiner, we are also unpersuaded by the appellants' argument that JP '972 would not have suggested less than 10% by weight of polymer A) as required by claim 25. While the lowest value disclosed in this reference is 10% by weight, this disclosure would have suggested less than 10%, such as 9.99%, by weight based on the reasonable expectation that the suggested value is so close to the disclosed value that the same desirable properties would be expected in either case. See Titanium Metals Corp. v. Banner, 778 F.2d 775, 783, 227 USPQ 773, 779 (Fed. Cir. 1985).

37 CFR § 41.37(c)(1)(ix)(Sept. 13, 2004), the evidence appendix of the appellants' brief expressly states "None" with respect to any patentability evidence proffered on this appeal. As a consequence, this opinion will not contain any further exposition of the specification data or the appellants' discussion thereof.

On the other hand, we find convincing merit in the appellants' contention that the 40% by weight minimum of JP '037 would not have suggested the less than 10% by weight feature of claim 25 and certainly would not have suggested the less than or equal to 5% by weight feature of claim 26. There is corresponding merit in the appellants' argument that the 10% by weight minimum of JP '972 would not have suggested the less than or equal to 5% by weight value of claim 26. This is because the values required by these claims are substantially below the lowest values disclosed in the Japanese references. Under these circumstances, the here claimed values would not have been suggested in any way by the Japanese reference disclosures. See In re Sebek, 465 F.2d 904, 907, 175 USPQ 93, 95 (CCPA 1972).

In light of the foregoing, we hereby sustain the § 103 rejection based on JP '037 of claims 16, 17 and 22- 24, but we will not sustain the corresponding rejection of claims 25 and 26. Analogously, we hereby sustain the § 103 rejection based on JP '972 of claims 16, 17 and 22-25, but we will not sustain the corresponding rejection of claim 26.

We hereby sustain the § 103 rejection of claim 4 as being unpatentable over JP '037 or JP '972 in view of Lattime since this rejection has not been separately contested by the appellants on this appeal (see page 17 of the brief).

We also hereby sustain the § 103 rejection of claims 5, 6, 13, 27 and 28 as being unpatentable over JP '037 or JP '972 in view of Smesny for reasons tantamount to those previously discussed. However, we can not sustain the corresponding rejection of claim 29 since, as explained earlier, the 5% by weight maximum of polymer A) required by this claim

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is far below the minimum values disclosed in the Japanese references and thus would not have been suggested thereby. Sebek, id.

The appellants' arguments regarding claims 20 and 21 correspond to those previously discussed and are unpersuasive for reasons previously discussed. We hereby sustain, therefore, the § 103 rejection of claims 20 and 21 as being unpatentable over JP '972.

Notwithstanding a full consideration of the appellants' arguments thereagainst, we also hereby sustain the § 103 rejection of claim 21 over Perlinski as well as the § 103 rejection of claims 13, 27 and 28 over Perlinski in view of Smesny for reasons analogous to those previously advanced. On the other hand, the § 103 rejection of claim 29 over Perlinski in view of Smesny can not be sustained because Perlinski's 10% minimum value would not have suggested the appellants' claimed 5% maximum value. Sebek, id.

In summary, we have not sustained any of the § 103 rejections of claim 26 and of claim 29, nor have we sustained the § 103 rejection of claim 25 over JP '037. However, we have sustained each of the other rejections advanced by the examiner on this appeal.

The decision of the examiner is affirmed-in-part.

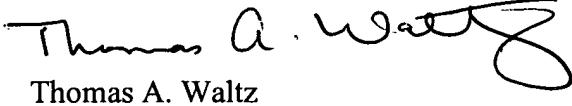
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No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a)(iv)(effective Sept. 13, 2004).

AFFIRMED-IN-PART


Bradley R. Carris
Administrative Patent Judge


Thomas A. Waltz
Administrative Patent Judge


Jeffrey T. Smith
Administrative Patent Judge

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